

NOVEMBER 27. 1765.

# INFORMATION

F O R

Walter, David, and Alexander Cunninghames *Compteney of the*  
*Sons procreate of the Marriage, between Captain*  
Alexander Montgomery-Cunninghame of Kirk-  
tonholm, and Mrs. Betty Montgomery, his Wife,  
and of the Trustees, at whose Instance Execution is  
ordained to pass for Implement of the Contract of  
Marriage, executed between the said Captain Alex-  
ander Montgomery and Mrs. Betty Montgo-  
mery,

A G A I N S T

Thomas Forbes, Merchant in London, eldest Son of  
Thomas Forbes of Waterton.

**O**F this Date, Mrs. Anne Montgomery of Kirktonholm, 9 August, 1756.  
executed a strict Settlement of Tailzie of her Estate,  
of about 55 l. yearly Rent, " in favour of herself,  
" and the Heirs whatsoever of her Body; whom  
" failing, to Captain Alexander Cunninghame of Corsehill, her  
" Nephew, eldest Son procreated between Sir David Cun-  
" ninghame of Corsehill, and the deceased Mrs. Penelope  
" Montgomery, her Sister, and to the Heirs-male of the Body of  
" the said Alexander Cunninghame; whom failing, to David  
" Cunninghame, second Son of the said Sir David Cunninghame,  
" and the Heirs-male of his Body; whom failing, to Walter  
" Cunninghame, third Son of the said Sir David Cunninghame,  
A " and

“ and to the Heirs-male of his Body; whom failing, to the  
 “ Heirs-male, descending of the Body of *Margaret Montgo-*  
 “ *mery*, her Sister, Wife of *Thomas Forbes* of *Waterton*, and  
 “ the Heirs-male of the Bodies of these Heirs-male;” and  
 whom failing, to a Series of other Substitutes, therein  
 mentioned, with, and under the Provisions, Conditions,  
 Burdens, Reservations, Restrictions, Limitations, Clauses  
 irritant and resolute, therein contained.

Then follows a Variety of other Clauses, respecting the al-  
 tering or innovating the Order of Succession; the selling,  
 wadsetting, or impignoring the Lands, the Provisions to  
 Wives and younger Children, with other Particulars, unne-  
 cessary to be minutely recited.

But the following Clause, as the Foundation of the present  
 Question, merits a more particular Attention. It is pro-  
 vided, “ That, if the Right of Succession to my Lands and  
 “ Estate above mentioned, shall, in virtue hereof, and by the  
 “ Failure of Heirs whatsoever of my Body, fall to, and de-  
 “ volve upon the said *Alexander Cunninghame*, or any other  
 “ of the said Heirs of Tailzie, having Right to the Lands  
 “ and Estate of *Corsehill*, or to any other Land-estate and In-  
 “ heritance, then, and in that Case, the said *Alexander Cun-*  
 “ *ninghame*, or any other Heir of Tailzie for the time, having  
 “ Right to the said Estate of *Corsehill*, or to any other Land-  
 “ estate, shall be holden and obliged, within the Space of six  
 “ Months after their Succession to my said tailzied Lands and  
 “ Estate, to settle and secure their said Lands and proper  
 “ Estate, in favours of the same Heirs of Tailzie, hereby  
 “ appointed to succeed to my said Lands and Estate of *Kirk-*  
 “ *tonholm*, under the same Provision and Irritancy, and of  
 “ carrying the Name and Arms of *Montgomery* of *Kirktonholm*,  
 “ and with and under the other Conditions, Provisions, Re-  
 “ strictions, Limitations, Clauses irritant and resolute, above  
 “ specified, contained in this present Tailzie, declaring, that  
 “ if the said *Alexander Cunninghame*, or the Heir of Tailzie  
 “ for the time in the Right of the said Estate of *Corsehill*,  
 “ shall



“ shall refuse or neglect to settle and secure the said Lands  
 “ and Estate of *Corsehill*, or any other Land-estate then be-  
 “ longing to them, in the Way and Manner before prescribed,  
 “ within the said Space of six Months after their Succession  
 “ to my said tailzied Lands and Estate, then, and in that  
 “ Case, the Person so contraveening, shall not only for him,  
 “ or herself, but also for all the other Heirs of Tailzie above  
 “ mentioned, descended of the said Sir *David Cunninghame*,  
 “ amit, lose, and forfeit their Right and Title to my said  
 “ tailzied Lands and Estate, which shall from thenceforth be-  
 “ come, *ipso facto*, extinct, void, and null, and the same  
 “ shall fall, accresce and belong to the Heirs-male of the Bo-  
 “ dy of the said Mrs. *Margaret Montgomery*, Lady *Waterton*,  
 “ who shall be holden and obliged to settle, tailzie, and in-  
 “ corporate their proper Lands and Estate, in the same Man-  
 “ ner, and with, and under the Conditions, Provisions, Re-  
 “ strictions, Limitations, Clauses irritant, and Faculties above  
 “ specified, contained in this present Tailzie.”

The Scheme of Accumulation, and extraordinary Plan of  
 Aggrandizement, contained in the above Clause, is qualified  
 by an Exception in the following Terms: “ Declaring never-  
 “ theless, that any Entail or Settlement to be made of the  
 “ said Estate of *Corsehill*, in Manner before prescribed, shall  
 “ be subject always to such Provisions and Burdens, as are  
 “ contained in the Contract of Marriage between the said  
 “ *Alexander Cunninghame* and Mrs. *Betty Montgomery*, his  
 “ Wife, either in favours of her or the Heirs of the Marriage,  
 “ and shall be subject likewise to the Payment of all the just  
 “ and lawful Debts resting by the said *Alexander Cunninghame*,  
 “ or by the Heir in Possession of the Estate of *Corsehill* at the  
 “ time, with all which, the Entail thereof is to be expressly  
 “ burdened, and with, and under the like Exception and  
 “ Declaration, with respect to the other Heirs of Tailzie  
 “ above mentioned, on their adjoining and incorporating  
 “ their proper Estates to the said Lands and Estate of *Kirk-*  
 “ *tonholm*.”

Mrs.

April 7,  
1761.

Mrs. *Anne Montgomery* died without Issue, whereby the Succession to the Estate of *Kirktonholm*, under that Lady's Deed of Settlement, devolved upon Captain *Cunninghame* of *Corsehill*.

Feb.  
1754.

This Gentleman, by Marriage-articles, of this Date, passed between him and Mrs. *Betty Montgomery*, *Lainshaw's* eldest Daughter, had become "bound and obliged to provide and secure the whole Lands, Superiorities, and other Estate, heritable or moveable, then belonging to him, or which he should succeed to or acquire, during the Standing of the said Marriage, together with the Lady's Portion of 11,000 Merks, to himself, and the Heir-male to be procreated of said Marriage; whom failing, to his Heirs and Assignees whatsoever," with and under the Burden of the Liferent Provisions therein conceived in favour of the Lady, in case of her Survivance, and of certain Provisions to the Daughters of the Marriage, in case there should be no Heir-male. It was agreed, that Execution, in implement of this Marriage-agreement, should pass at the Instance of certain Persons therein named, and amongst those was *Alexander Boswel* of *Auchinleck*, one of the Senators of the College of Justice, the Lady's Uncle, and *James Montgomery* of *Lainshaw*, the Lady's Brother, or any one of them.

Sept. 1.  
1761.

Although it occurred to Captain *Cunninghame*, that he could not *effectually* fulfil Mrs. *Montgomery's* Intention, in entailing his Estate of *Corsehill*, by reason of the Obligation in his own Contract of Marriage, yet, in order to comply therewith, so far as was in his Power, he executed a Tailzie of the Estate of *Corsehill*, in exact Conformity to the Lady's Settlement of the Estate of *Kirktonholm*.

This Step, so much in contravention of the Marriage-contract, alarmed those Gentlemen at whose Instance Execution was appointed to pass, who therefore brought a Process of Reduction in their own Names, and in name of the three Infants above mentioned, being the only Sons then existing of the Marriage, against Captain *Cunninghame*, and the Substitutes



stitutes in the Entail, to set aside the Tailzie of the Estate of *Corsehill*, execute by Captain *Cunninghame*, as done not only in fraudem of Captain *Cunninghame*'s own Contract of Marriage, but likewise as contrary to the Exception of the Tailzie of *Kirktonholm*, which liberate Captain *Cunninghame* from any Obligation to tailzie the Estate of *Corsehill*, because of the previous Obligations and Provisions in his own Marriage-contract.

The Summons not only contains this Conclusion of Reduction, but likewise contains a Declaratory Conclusion, to have it found and declared, that the Pursuers, the Sons of Captain *Cunninghame*, notwithstanding their possessing the Estate of *Corsehill*, free and unlimited by the Fetters of an Entail, shall not be prejudged in their Right of Succession to the Estate of *Kirktonholm*, and other Subjects contained in the Tailzie of that Estate, when, in the Course of Succession thereby established, that Right shall devolve upon them.

The first Conclusion of the Summons is already under the Consideration of your Lordships, by Petition and Answers, at advising which it occurred to be proper, previous to any Determination, that the whole Cause should be brought before the Court, in which View the Cause was remitted to Lord *Stonefield*, Ordinary, who, having heard Parties thereupon, took the second Conclusion of the Summons to report, and the following Observations are humbly submitted, for the Information of your Lordships, July 24,  
1765.

It was pleaded for the Pursuer, that if Captain *Cunninghame* was either not at liberty to execute this Tailzie of the Estate of *Corsehill*, because of the Obligations of his own Contract of Marriage, or if he was not bound to execute such a Tailzie, because of the Exception in the Tailzie of the Estate of *Kirktonholm*, in these Cases, if it was found that Captain *Cunninghame*, by not doing what he was not at liberty to do, or what he was not bound to do, could not forfeit his own Right of Succession to the Estate of *Kirktonholm*, far less could he forfeit the Right of his Children, the Pursuers,

fuers, when the Succession, in due Course, should devolve upon them.

It was answered for the Defender, that even although it should be found, that Captain *Cunninghame* himself was either not at liberty, or was not bound to execute the Tailzie of *Corsehill*, because of the Collisions of Obligations contained in the Tailzie of *Kirktonholm*, and those contained in his own Marriage-contract, and therefore did not incur the Forfeiture, yet that Indulgence was only personal to himself, and cannot extend to his Heirs, who are under no Restraint, and who are expressly taken bound to lay under the Fetters of an Entail, similar to that of *Kirktonholm*, every Estate of which they should be possessed when they succeeded to the Estate of *Kirktonholm*.

Upon these Arguments, offered for the different Parties, your Lordships are to determine; and it will readily occur, that if the Construction, given to this Clause by the Defenders, is well founded, the Pursuers, upon the first Branch of this Cause, have been maintaining a very fruitless Argument; for if they themselves will be under the Necessity of entailing the Estate of *Corsehill*, upon their Succession to the Estate of *Kirktonholm*, then it was in vain for them or their Friends to have insisted in a Reduction of Captain *Cunninghame's* Tailzie, because it is upon his Death alone that they can acquire Right either to the Estate of *Kirktonholm*, or to the Estate of *Corsehill*.

But, upon a fair and just Construction of the Clause in the *Kirktonholm* Settlement, the Pursuers cannot imagine your Lordships will ever admit of that extraordinary Interpretation given to it by the Defenders; it is not the Genius of the Law to extend the Limitations and Fetters of an Entail, but if this Interpretation be a just one, it would indeed be a most unprecedented Extension of the Conditions of an Entail.

For your Lordships will be pleased to observe, that if this Construction is just, it must lead into this inevitable Consequence, that Mrs. *Anne Montgomery's* Settlement shall not only



ly be a Tailzie of the Estate of *Kirktonholm*, and of *Corsehill* or *Waterton*, but likeways of every Estate, which the Heirs of Entail, at any after Period, to the remotest Generations, should be able to acquire.

The Lady's Settlement is abundantly extravagant, when it carries along with it the Estates of *Corsehill* or *Waterton* to the remoter Heirs of *Kirktonholm*, in exclusion of the natural Heirs of these respective Families, but it does not go to such Pitch of Extravagance as is here supposed.

When this Clause in the *Kirktonholm* Settlement, ordains the Heir at the Time in the Estate of *Corsehill* to execute a Tailzie of that Estate, and any other Land-estate and Inheritance, and lays the same Injunction upon the Heirs of *Waterton*, the Import of it plainly is no other than this, that the Person, Proprietor of the Estates of *Corsehill* or *Waterton*, (whether Captain *Cunninghame* or his Son, or Lady *Waterton's* Sons) succeeding to the Lady herself in the Estate of *Kirktonholm*, should be bound to tailzie that Estate, and every other Estate they should *then* be possessed of: She has not there said, that every after Heir, from Generation to Generation, shall be bound to tailzie their several Estates: Her Views went no farther than the immediate Successor to her in the Estate of *Kirktonholm*, whether in the Person of Captain *Cunninghame* or his Sons, or of the Sons of Lady *Waterton*.

Put the Case, that Captain *Cunninghame* should now acquire another Estate, to which he had no Right, at Lady *Kirktonholm's* Death, it is clear as Sun-shine, that he is not bound to tailzie the same; and if the Captain is not bound to tailzie his after Acquisition, how is it possible, that the after Heirs to the remotest Generations, should be bound successively to tailzie their respective Estates?

If Mrs. *Anne Montgomery* had meant, that every after Purchase or Acquisition, made at any future Period, and by any after Heir of Entail, should be subjected to the Fetters of the Tailzie of *Kirktonholm*, she should have taken all the after Heirs expressly bound, upon the Purchase or Acquisition  
of

of an Estate, immediately to subject that Estate to the Fetters of her Entail; but it would be most absurd to imagine, that she would give to the Lands a temporary Freedom, during the Life of the first Purchaser or Acquirer, but subject them to the Fetters of a strict Entail, in the Person of the first Heir, after the Death of the Purchaser.

If this Clause in the *Kirktonholm* Settlement, was to receive so extraordinary a Construction, the inevitable Consequence would be, that no Heir of the Family of *Corsehill* or *Waterton*, durst venture to add one Inch of Property to their own natural Estates, because there was no Security that such Additions might not be carried off and forfeited to another Family, with which they had no Connexion. For Example, If the Pursuers, the three Sons of Captain *Cunninghame*, should, each of them, in due course, succeed to the Estate of *Corsehill*, and, during their Possession, by Industry and Application, make large Additions to that Estate, according to the Defender's Argument, each succeeding Heir would be obliged to tailzie the Acquisitions of his Predecessor, and it would be in the Power of a fourth Brother, by incurring a Forfeiture, upon the *Kirktonholm* Settlement, to throw the whole of those Estates into the Family of *Waterton*, in prejudice of all the natural Heirs or Representatives of the respective Acquirers.

Such are the absurd Consequences of such an Interpretation. But as there are no Words in the Lady's Settlement, that can give Countenance to such a Construction, it is so highly extravagant, that no Court of Justice will be disposed to strain the Words, so as to imply such an extravagant Condition.

It is obvious, the Lady had nothing in view, but her immediate Successors, whether of the Families of *Corsehill* or *Waterton*, that which-ever of those Estates should furnish her an Heir, should likewise be subjected to the Fetters of her Entail. That this was her View, is apparent from the Time limited to execute such an Entail: It is limited to the Period  
of



of six Months, which in no shape can apply to After-acquisitions, and clearly respects only that Period subsequent to her own Death.

Such being the natural and obvious Construction of this Clause in the *Kirktonholm* Settlement, the Plea of the present Pursuers seems to be undoubtedly well founded; for, if your Lordships are of opinion, that Captain *Cunninghame*, on account of the Obligation in his own Contract of Marriage, was not at liberty to execute a Tailzie of the Estate of *Corsehill*, or that the Exception in the Tailzie of *Kirktonholm*, freed him from any Obligation to execute such an Entail; and if your Lordships are further of opinion, that, by not doing what he was not at liberty to do, or what he was not bound to do, Captain *Cunninghame* cannot forfeit for himself the Right to the Estate of *Kirktonholm*, then it seems to follow as a necessary Consequence, that his Children, the Pursuers, are entitled to succeed to that Estate in due course, notwithstanding they possess the Estate of *Corsehill*, free and unlimited by the Fetters of an Entail.

This Consequence seems to follow necessarily, for this Reason, that the Injunction to execute a Tailzie of the Estate of *Corsehill*, can apply solely to the immediate Successor of Mrs. *Anne Montgomery*, and therefore cannot apply to the Pursuers, who are not her immediate Successors, but will only succeed to the Estate of *Kirktonholm*, by the Decease of Captain *Cunninghame*, their Father.

For these Reasons, it is humbly hoped your Lordships will have no Difficulty to declare, that the Pursuers shall not be prejudged in their Right of Succession to the Estate of *Kirktonholm*, and other Subjects in the Tailzie of that Estate, notwithstanding they possess the Estate of *Corsehill*, free from any Fetters or Limitations.

*In respect whereof, &c.*

HENRY DUNDAS.





